Supreme Court, U.S.
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No. 95-1634

In the Supreme Court of the United States

OCTOBER TERM, 1995

PACIFIC GAS AND ELECTRIC COMPANY,
PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

DREW S. DAYS, III
Solicitor General
PETER D. COPPELMAN
Acting Assistant Attorney General
JACQUES B. GELIN
ROBERT L. KLARQUIST
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 514-2217

19 pp

QUESTION PRESENTED

Whether the Just Compensation Clause of the Fifth Amendment requires the government to pay compensation to an entity which has been issued a license to utilize federal lands for a fixed period of time, when the government determines that, upon expiration of the license, it will use the federal lands for a different purpose and, for that reason, not renew the expiring license.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A10) is reported at 73 F.3d 953. The decisions and orders of the district court (Pet. App. B1-B50) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 11, 1996. The petition for a writ of certiorari was filed on April 10, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Section 1 of the Federal Water Power Act (FWPA or Act), ch. 285, 41 Stat. 1063, 16 U.S.C. 792, created the Federal Power Commission (Commission).[1] Section 4(d) of the Act (later redesignated as Section 4(e), 16 U.S.C. 797(e), by Section 202 of the Public Utility Holding Company Act of 1935, ch. 687, 49 Stat. 840) empowered the Commission, among other things, to issue licenses for the occupation of federal lands for water power purposes. Section 6 of the Act, 16 U.S.C. 799, limits the duration of licenses issued under the Act to "a period not exceeding fifty years." Section 10(i) of the FWPA authorized the Commission to waive—with the express exception of the 50-year maximum period for licenses—any of the Act's conditions, provisions, and requirements when issuing licenses for a "minor part" of a complete project.[2]

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[1] The Federal Power Commission was terminated in 1977 and all of its functions relevant here were transferred to the newly created Federal Energy Regulatory Commission. Section 402 of the Department of Energy Organization Act, Pub. L. No. 95-91, 91 Stat. 583-585 (codified at 42 U.S.C. 7172). For convenience, this brief employs the term "Commission" as meaning both the Federal Power Commission and its successor agency.

[2] Section 10(i) states in pertinent part:

> In issuing licenses for a minor part only of a complete project * * * the Commission may in its discretion waive such conditions, provisions, and requirements of this subchapter, except the license period of fifty years, as it may deem to be to the public interest to waive under the circumstances * * *.

16 U.S.C. 803(i).

Sections 14(a) and 15(a) of the FWPA, 16 U.S.C. 807(a) and 808(a), concern the disposition of the licensee's project works at the end of the license period. Section 14(a) provides, in substance, that the United States may, upon the expiration of the license and subject to certain conditions and restrictions, "take over and thereafter to maintain and operate any project or projects" licensed under the Act upon the payment of the licensee's net investment in the project, not to exceed the fair market value of the property taken, plus certain other payments in particular circumstances.[3] Section 15(a) authorizes the

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[3] Section 14(a), as originally enacted in 1920, stated in part:

> That upon not less than two years' notice in writing from the commission the United States shall have the right upon or after the expiration of any license to take over and thereafter to maintain and operate any project or projects as defined in section 3 hereof, and covered in whole or in part by the license, or the right to take over upon mutual agreement with the licensee all property owned and held by the licensee then valuable and serviceable in the development, transmission, or distribution of power and which is then dependent for its usefulness upon the continuance of the license * * * upon the condition that before taking possession it shall pay the net investment of the licensee in the project or projects taken, not to exceed the fair market value of the property taken, plus such reasonable damages, if any to property of the licensee valuable, serviceable, and dependent as above set forth but not taken, as may be caused by the severance therefrom of property taken, and shall assume all contracts entered into by the licensee with the approval of the commission. * * * *Provided*, That the right of the United States * * * to take over, maintain, and operate any project licensed under this Act at any time by condemnation proceedings upon payment of just compensation is hereby expressly reserved.

Commission to issue a new license to the original licensee upon the expiration of an existing license when the United States does not exercise its Section 14(a) "take over" rights. Section 15(a) further authorizes the Commission to issue a new license to a new licensee upon the expiration of the old license. Under the latter scenario, Section 15(a) requires the new licensee to make payment to the former licensee in substantially the same manner as Section 14(a) requires the United States to make payment to the original licensee when the government takes over the project.[4]

This provision was revised in respects immaterial here by Section 207 of the Public Utility Holding Company Act of 1935, ch. 687, 49 Stat. 844-845.

[4] Section 15(a) provides in pertinent part:

> If the United States does not, at the expiration of the existing license, exercise its right to take over, maintain, and operate any project or projects of the licensee, as provided in section 807 of this title, the commission is authorized to issue a new license to the existing licensee upon such terms and conditions as may be authorized or required under the then existing laws and regulations, or to issue a new license under said terms and conditions to a new licensee * * * and shall * * * pay such amount, and assume such contracts as the United States is required to do in the manner specified in section 807 of this title: *Provided*, That in the event the United States does not exercise the right to take over or does not issue a license to a new licensee, or issue a new license to the existing licensee, upon reasonable terms, then the commission shall issue from year to year an annual license to the then licensee under the terms and conditions of the existing license until the property is taken over or a new license is issued as aforesaid.

2. In 1925, the Oakdale Irrigation District and the South San Joaquin Irrigation District (Districts) entered into a contract with petitioner and the Sierra and San Francisco Power Company (power companies). The contract called for the Districts to construct a reservoir on the Stanislaus River, near Melones, California, and for the power companies to build and operate certain hydroelectric facilities, including a powerplant. CR 36, Exh. 13.[5]

Petitioner's predecessor then applied to the Commission for a "minor part" license under the FWPA. On November 12, 1929, the Commission issued the applicant a "License on Government Lands" for Project No. 708. The 1929 license "authoriz[ed] the use of such lands of the United States as are situated within the boundaries of said Melones reservoir for the purpose of passing through, storing in and receiving from said reservoir * * * water to be used for power purposes in the Licensee's project works." SER 27-28.[6] This authorization to use federal lands[7] was made subject to various terms and restrictions, several of which are pertinent here.

First, as noted above, FWPA Section 10(i) granted the Commission discretionary authority, when issuing licenses for a "minor part" only of a complete project, to waive such conditions, provisions, and requirements of the FWPA as it might deem in the public interest to waive, *except* the 50-year limit on

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[5] "CR" refers the Clerk's Record as indicated by the entries on the district court's docket sheet.

[6] "SER" refers to the Supplemental Excerpts of Record filed in the court of appeals.

[7] Approximately 402 acres of federal lands were encompassed by the 1929 permit. SER 13.

the term of the license. With regard to the 1929 license, the Commission, after agreeing that the application was for a "minor part" of a complete project (SER 20), stated that "the Commission waiv[es] such provisions and requirements of [the FWPA] as may be waived under the authority of section 10, subsection (i) of said act, except such as the Executive Secretary may incorporate in the license as necessary in the public interest." *Ibid.* This waiver was reiterated at page 8 of the license. SER 28.[8]

Second, the license had an expiration date of June 1, 1977. Article 1 of the license stated that "[t]his license is issued for the period of time, not, however, extending beyond June 1, 1977." SER 28. There were no provisions in the 1929 license conferring any rights upon the expiration of the license.

3. The Navigation and Flood Control Act of 1944, ch. 665, 58 Stat. 901, authorized (but did not fund) a federal "New Melones" project to be constructed at the site of the smaller, existing "Old Melones" dam and reservoir. The New Melones project was subsequently reauthorized by the Flood Control Act of 1962, Pub. L. No. 87-874, 76 Stat. 1191.

Meanwhile, petitioner entered into an agreement with the Districts whereby petitioner would, among other things, purchase energy from a new project

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[8] Petitioner asserts (Pet. 3) that "[a]s an inducement to build the project despite the use of relatively little public land, the government expressly waived its statutory right to take over the powerplant upon expiration of the license." Petitioner, however, fails to give any record reference citation in support of its assertion that the Commission's waiver of the application of FWPA Sections 14(a) and 15(a) was given "[a]s an inducement to build the project" and we have been unable to find anything in the record which substantiates that assertion.

proposed by the Districts. To assist the Districts in obtaining project financing, petitioner filed an application in 1953 with the Commission seeking a major 50-year license which would encompass several of petitioner's existing projects already under license, including the Old Melones facilities. The combined project for which the application was sought was referred to as Project No. 2130. The proposal contemplated that petitioner would surrender the 1929 minor part license for its Old Melones facilities should the application for a new permit be granted. SER 2.

In 1955, the Commission issued a major license for Project No. 2130, replacing, among other things, the minor part license for Project No. 708. Pet. App. B29; ER 31, Exh. F.[9] The 1955 license was issued for a 50-year period, beginning January 1, 1955. ER 31, Exh. F at 8. The new license, however, contained an article (Article 36) which, in substance, provided that, in the event that the United States were to acquire the petitioner's Old Melones interests, petitioner would be entitled to receive no more in compensation for the New Melones Project than that amount to which petitioner would have been entitled under the 1929 license. Pet. App. A3 n.1.

4. The United States commenced this condemnation action in 1976, in order to acquire property interests needed for the New Melones Project. CR 1. The government filed a Declaration of Taking, with an agreed effective date of July 8, 1976, by which the United States acquired a parcel of land encircling petitioner's Old Melones powerplant, thereby cutting

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[9] "ER" refers to the Excerpt of Record filed in the court of appeals.

off its water supply and rendering it incapable of generating electric power. Pet. App. A4. The government's Declaration of Taking was accompanied by a deposit of $1.3 million into the registry of the district court as estimated just compensation for the taking. *Ibid.*

In the ensuing proceedings, it was uncontested that petitioner was entitled, at a minimum, to recover just compensation for the taking of the Old Melones facilities in an amount based upon petitioner's right to generate power up to the June 1, 1977, expiration date of the 1929 license. The parties disagreed, however, concerning whether petitioner could validly claim compensation based on any rights or expectancies to generate after that date. Petitioner asserted, in substance, that, in ascertaining just compensation, the court must entirely disregard Congress's decision to proceed with the New Melones Project and render an award based on the expectancy that the Commission would have renewed petitioner's license in the absence of the New Melones Project.[10] Employing this approach, petitioner maintained that it was entitled to receive up to $102 million in compensation. Pet. 11. Conversely, the government maintained that petitioner was entitled to compensation based upon its rights to generate power up to the June 1, 1977, expiration date and nothing more. Pet. C.A. Br. 17.

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[10] Petitioner contended that, absent the New Melones Project, the Commission could have been, in effect, expected to have renewed the license for a new 50-year term commencing in June 1977, thus giving petitioner the right to continue to occupy the subject federal lands for power purposes until at least 2026. Pet. C.A. Br. 5, 11-12, 28-29.

In its rulings upon motions for partial summary judgment and related subsequent motions, the district court, after some wavering (Pet. App. B28-B37), ultimately concluded that petitioner was not entitled to compensation based upon any rights or expectancies to generate power after June 1, 1977 (*id.* at B38-B47). The parties thereafter stipulated to entry of a judgment awarding compensation in the amount of the government's initial deposit of $1.3 million, but preserving the parties' rights to appeal the district court's prejudgment rulings. Petitioner thereafter appealed.

5. The court of appeals affirmed (Pet. App. A1-A10). The court of appeals rejected petitioner's contention that it was entitled to compensation based on an expectancy that the Commission would have renewed its Old Melones license, absent the New Melones Project. Finding "that *Fuller* [*United States* v. *Fuller*, 409 U.S. 488 (1973)], not *Almota* [*Almota Farmers Elevator Warehouse Co.* v. *United States*, 409 U.S. 470 (1973)], supplies the proper resolution to the case at bar" (Pet. App. A7), the court ruled that because petitioner's 1929 license did not authorize it to occupy federal property for power generation purposes after June 1, 1977, petitioner was not entitled to any compensation based on any expectancy to generate power after that date. In so holding, the court of appeals explained (*ibid.*) that "[i]n *Almota*, the interest which the tenant did not own, but which generated value for which the tenant should be compensated, was owned privately" whereas "[i]n *Fuller* and in the case at bar, the interest generating the disputed value is owned by the condemning authority." In so ruling, the court rejected (*id.* at A10) petitioner's contention that the courts must

disregard the pendency of the New Melones Project and compensate petitioner based upon the expectancy that the Commission would have renewed petitioner's license in the absence of that new federal project.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any of the courts of appeals. Accordingly, further review is not warranted.

1. Petitioner had no rights under the 1929 license to continue to occupy federal lands for power purposes after the June 1, 1977, expiration date of that license. Contrary to petitioner's insinuations (Pet. 5-6, 22-25), the fact that the 1929 license waived the government's rights under FWPA Sections 14(a) and 15(a) to take over, or allow others to take over, the petitioner's project works upon expiration of the license pursuant to statutorily prescribed payment criteria did not give the petitioner a legally-protectable "expectation" that the license would be renewed. Any such expectation would be unwarranted given that FWPA Section 6 expressly provides that any license issued under the Act "shall be issued for a period not exceeding fifty years" (16 U.S.C. 799) and that Section 10(i) authorizes the Commission, when issuing a "minor part" license, to waive any of the Act's conditions, provisions, and requirements "except the license period of fifty years." 16 U.S.C. 803(i). In short, because the 1929 license waiving FWPA Sections 14(a) and 15(a) contained no provision granting petitioner any rights upon the license's expiration, all of petitioner's rights under that license lapsed upon expiration of that license.

2. Contrary to petitioner's contention (Pet. 18-21), the present case is fundamentally different from the situation this Court addressed in *Almota Farmers Elevator Warehouse Co.* v. *United States*, 409 U.S. 470 (1973). The condemnee in *Almota* was a company (Almota) which was conducting grain elevator operations on land adjacent to the tracks of a railroad, on a parcel leased from the railroad. The railroad had previously routinely granted Almota several renewals of the lease. When the government's condemnation action was filed, the current lease had seven and one-half years remaining on its term.

Almota contended that as "it was in the interest of the railroad, as fee owner, to continue leasing the property," 409 U.S. at 475, Almota was entitled to receive compensation based not only on the unexpired portion of its leasehold, but also on the expectancy that the railroad would again renew the current lease upon expiration. This Court agreed. In so ruling, the Court addressed the government's argument that it would be unreasonable to compensate Almota based on any expectancies of renewal since the government could simply purchase the railroad's interest and wait until the expiration of the lease term to take possession of the land, after which it could compel Almota to remove its improvements. The Court answered that contention by stating that "the taking for [the government's project] was one act requiring proceedings against owners of two interests." 409 U.S. at 477. The Court also noted that "neither action by the Government nor location adjacent to public property contributed any element of value to Almota's leasehold interest." 409 U.S. at 476 n.3.

Thus, as the court of appeals here correctly recognized, *Almota*, unlike the present case, did not involve

any interests or expectancies claimed by the condemnee with respect to federal lands. Rather, petitioner's position here is much more closely analogous to the situation in *United States* v. *Fuller*, 409 U.S. 488 (1973), which was handed down on the same day as *Almota*. In *Fuller*, this Court held that a rancher whose fee lands were condemned by the government was not entitled under the Fifth Amendment to be paid for any enhanced values stemming from the fact that the rancher was using federal lands for which he held revocable grazing permits issued under the Taylor Grazing Act, 43 U.S.C. 315 *et seq.*, in conjunction with his own lands. This Court held that "[the United States] need not compensate for value that it could remove by revocation of a permit for the use of lands that it owned outright." 409 U.S. at 492.

Just as the condemnee in *Fuller* was not entitled to compensation for values that the United States could remove by revoking a permit for the use of federal lands, the petitioner here is not entitled to compensation for "values" in excess of those occupancy rights which lapsed upon the expiration of its 1929 license. As the court of appeals explained (Pet. App. A7-A8), "[i]t is one thing for the market to value the probability that a third party will exercise its liberty in a particular way and make the government pay for that market value, but quite another to make the government pay for its own contractually preserved right to do as it chooses."

3. In contending that it is entitled to be compensated based upon the expectancy that the Commission would have renewed its Old Melones license, petitioner asserts (Pet. 17-19) that the courts must disregard the New Melones Project and its impact upon the prospects that the Commission would

have renewed petitioner's license.[11] In so contending, petitioner attempts to invoke the general rule that the potential economic impacts of the government's pending project upon the value of the taken property must ordinarily not be taken into account in condemnation cases when determining the value of that property. See *United States* v. *Reynolds*, 397 U.S. 14, 16 (1970); *United States* v. *Virginia Electric & Power Co.*, 365 U.S. 624, 636 (1963).

As the court of appeals correctly recognized (Pet. App. A10), however, that general rule, which applies in ordinary cases where the government holds no pre-project rights concerning any of the lands or facilities involved, does not apply under the present circumstances. In *Fuller*, this Court held that the general rule that compensation for a taken tract includes any increment of value resulting from the taken property's use in conjunction with other lands does not apply when the "other lands" are federal lands being used under a revocable permit. The same reasoning also requires that the general rule that the pendency of the government's project should not be taken into account in determining the value of the condemned premises must be inapplicable where, as here, the effect of applying that rule would be to give the condemnee compensable rights in federal lands in excess of those conferred by the authority which allowed it to occupy those federal lands in the first place. Indeed, since petitioner has been awarded full

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[11] Petitioner did not contend in the courts below that there would have been any cognizable possibility that the Commission would have renewed petitioner's Old Melones license in the face of Congress's decision to proceed with the New Melones Project. Rather, petitioner contended that the court could not even consider that question.

compensation for its rights in federal lands under the only license it held, it is not apparent why disregard of the New Melones Project would, in any event, call for a different result in this case (see Pet. App. A10).

4. Finally, petitioner asserts (Pet. 26) that "the court of appeals did not properly balance public and private interests in ruling that the government's right to use its property trumped all of PG&E's * * * purely private Old Melones interests includ-[ing] its operating powerplant, its state water rights and its adjoining lands." Because, however, petitioner's 1929 license gave it a right to occupy federal lands for power purposes but "not * * * extending beyond June 1, 1977," there were no "public and private interests" to be balanced here. Rather, petitioner's right to occupy federal lands for power purposes lapsed when its 1929 license expired[12] and petitioner, which, as landowner, bore the burden of proof of establishing the value of the taken property,

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[12] Petitioner refers on several occasions (Pet. 2-3, 8-9, 22, 26) to a right-of-way over federal lands located in the bed of the Old Melones Reservoir. As the district court recognized in an earlier related condemnation action against the Districts (Pet. App. B8-B16), that right-of-way was issued to the Districts by the Secretary of the Interior pursuant to Section 18 of Act of the March 3, 1891, ch. 561, 26 Stat. 1101-1102, as amended by the Act of May 11, 1898, ch. 293, 30 Stat. 404, repealed by Section 706(a) of the Federal Land Policy and Management Act of 1976, Pub. L. No. 94-579, 90 Stat. 2793. In that earlier decision, the district court referred to that right-of-way as being one for "irrigation purposes" (Pet. App. B8) and petitioner did not contend in the lower courts that that right-of-way gave it any rights to occupy the subject federal lands for power purposes. Rather, petitioner based its case entirely upon the theory that it was entitled to the benefit of an expectation of renewal of its FWPA license.

see *United States ex rel. TVA* v. *Powelson*, 319 U.S. 266, 273 (1943), did not contend below that it could feasibly continue to operate its Old Melones facilities without continuing to use federal lands. That the federal lands under license comprised only a relatively small portion of the entire Old Melones project is immaterial—the licensee elected to construct that project after having obtained a license from the Commission which granted the licensee rights to occupy federal lands for power purposes until June 1, 1977, but no longer.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General
PETER D. COPPELMAN
Acting Assistant Attorney General
JACQUES B. GELIN
ROBERT L. KLARQUIST
Attorneys

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PETITIONER'S REPLY BRIEF

JOHN R. REESE
DONN P. PICKETT
Counsel of Record
KIRSTIE A. MCCORNOCK
Three Embarcadero Center
San Francisco, California
94111
Telephone: (415) 393-2000

RICHARD L. MEISS
PACIFIC GAS AND ELECTRIC
COMPANY
77 Beale Street
San Francisco, California
94106

*Attorneys for Petitioner
Pacific Gas and Electric
Company*

McCUTCHEN, DOYLE, BROWN
& ENERSEN LLP
Of Counsel

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

PETITIONER'S REPLY BRIEF

The United States' brief in opposition concedes that:

- This case presents a fundamental conflict between this Court's existing "working rules" of just compensation, Opp. 12-13;

- Only this Court – not Congress, not any court of appeal – can resolve the conflict over this Court's Fifth Amendment rules, Opp. 13-14; and

- The court of appeals below rejected this Court's "ignore the project" working rule and refused to allow any compensation based on the expectancy of renewal. Opp. 9-10.

Instead, the government makes four virtually identical arguments on the merits, each of which is wholly grounded in the observation that PG&E's power license expired in 1977. First, it claims that PG&E had no "legally-protectable 'expectation' " since its rights "lapsed upon expiration. . . . " Opp. 10. Then, it argues that *United States v. Fuller*, 409 U.S. 488 (1973) applies rather than *Almota Farmers Elevator Warehouse Co. v. United States*, 409 U.S. 470 (1973) because PG&E shouldn't get compensation "in excess of those occupancy rights which lapsed upon . . . expiration. . . . " Opp. 12. Next, it contends that the "ignore the project" working rule should not apply if the government has a preproject interest since the effect would be to give PG&E "compensable rights in federal lands in excess of those conferred . . . in the first place." Opp. 13. It concludes with more of the same: the government asserts there are no public and private interests to be balanced because

PG&E's "right to occupy federal lands for power purposes lapsed when its 1929 license expired. . . . " Opp. 14.[1]

Each of these arguments begs the issue presented by this petition. That issue is whether the government can use the effect of its new project to destroy all value of an existing private project simply because part of the value of the taken property derives from a federal license that has an expiration date.

PG&E doesn't contend it has a legal right to a license renewal as the government's opposition implies. But the fact that a license would expire some time after the taking is only the beginning, not the end of the inquiry. The questions remain (a) whether the chance of renewal has economic value and (b) whether the Fifth Amendment and this Court's equitable working rules require some compensation for that economic value. The answer to the

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[1] In its footnote 12 the government responds to PG&E's argument based on the limited fee interest it obtained from the Department of Interior as to federal lands involved in Old Melones. It says the right of way was limited to irrigation and that the issue was not raised below. In fact, the lands were used for the reservoir at Old Melones beginning in 1929 (App. B at 15) as explicitly contemplated in the right of way ("to develop power" *see* App. B at 9) and PG&E raised the exact same argument below. *See, e.g.*, Appellant's Reply Brief at 10-11 ("The right of way was not revocable at will. . . . Rather it is a 'limited fee'. . . . The government did not retain the right to take over the Melones project and therefore must pay the full market value for it.") The government never responds at all to PG&E's separate point (Pet. 22-25) that it has waived its Federal Water Power Act Section 14 rights to take over the project for less than fair market value.

first question is clearly yes; the court of appeals noted evidence of a "high likelihood of renewal." App. A at 5. The second question cannot be answered simply by repeating the premise. The mere existence of an expiration date doesn't answer whether the economic value, which has previously controlled the amount of just compensation, should be overridden solely due to the pendency of the project.

The only fair way to determine just compensation where a federal license is involved is to look at the economic value of the taken property as of the date of taking and to ignore the effect of the project. Under this Court's customary rule, the condemnee receives whatever value the market places on the expectation of (not the legal right to) renewal. Under the government's new rule, it can destroy a project worth over $100,000,000 simply because it can legally refuse to renew a license in the future.

The government's opposition fails to address the main points of PG&E's petition. It never responds to the fundamental point that the existence of an expiration date cannot control since the lease in *Almota* had an expiration date too. Pet. 25; *Almota*, 409 U.S. at 471. Nor does the government suggest any principled reason why the identity of the lessor/licensee should make a difference to the amount of compensation required by the Fifth Amendment. Finally, the government says nothing at all about any of the three justifications PG&E offered for application of the ignore project rule when the government has issued a license (*see* Pet. 27-28) or its analysis of that rule's application on facts far less compelling in *United*

States v. Virginia Electric & Power Co., 365 U.S. 624, 635-36 (1963). *See* Pet. 29-30.

Allowing the government to decrease the amount of just compensation – to distort the fair market value determination – by the effect of the taking itself is in fundamental conflict with the Fifth Amendment and this Court's working rules. If the ignore the project rule is not itself to be ignored, as the government concedes it was here, then this Court should be the one to declare that new rule.

Respectfully submitted,

JOHN R. REESE
DONN P. PICKETT
Counsel of Record
KIRSTIE A. MCCORNOCK
MCCUTCHEN, DOYLE, BROWN
& ENERSEN, LLP
Three Embarcadero Center
San Francisco, California 94111
Telephone: (415) 393-2000

RICHARD L. MEISS
PACIFIC GAS AND ELECTRIC COMPANY
77 Beale Street
San Francisco, California 94106

Attorneys for Petitioner Pacific Gas and Electric Company

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